No. 88-1553

Supreme Court, U.S.
FILED
SEP 19 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

JAMES G. RICKETTS, Director, Arizona Department of Corrections, and DONALD WAWRZASZEK, Superintendent of the Arizona State Prison,

Petitioners,

vs.

JOHN HARVEY ADAMSON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

MEMORANDUM 1

I. Alleged Right To Jury Determination Of Aggravating Circumstances. 1

II. Alleged Prosecutorial Vindictiveness..... 2

CONCLUSION 4

TABLE OF AUTHORITIES

Page

CASES:

Alabama v. Smith, ___ U.S. ___, 109 S. Ct. 2201 (June 12, 1989) 2

Hildwin v. Florida, ___ U.S. ___, 109 S. Ct. 2055 (May 30, 1989) 1

RULES:

Rules of the Supreme Court, Rule 22.6..... 1

MEMORANDUM

Pursuant to Rule 22.6, Rules of the Supreme Court, petitioners submit this supplemental brief containing authority not available when the petition was filed March 20 or when the reply was filed in its original form April 21.

I.

Alleged Right To Jury Determination Of Aggravating Circumstances.

Petitioners believe that this Court's decision in *Hildwin v. Florida*, ___ U.S. ___, 109 S. Ct. 2055 (May 30, 1989), conclusively answers the contention that the jurors must determine aggravating factors before a state may impose the death penalty. Upholding the death sentence imposed by the trial judge, who found four aggravating circumstances and no mitigation, this Court rejected the assertion that the Constitution required the jurors to make those findings:

> In *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), we rejected the claim that the Sixth Amendment requires a jury trial on the sentencing issue of life or death. In that case, we upheld against Sixth Amendment challenge the trial judge's imposition of a sentence of death notwithstanding that the jury had recommended a sentence of life imprisonment. We stated: "The fact that a capital sentencing is like a trial in the respects significant to the Double Jeopardy Clause . . . does not mean that it is like a trial in respects significant to the Sixth Amendment's guarantee of a jury trial." *Id.*, at 459, 104 S.Ct., at 3161.

> Nothing in our opinion in *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986), suggests otherwise. We upheld a Pennsylvania statute that required the sentencing judge to impose a mandatory minimum sentence if the judge found by a preponderance of the evidence that the defendant visibly possessed a firearm. We noted that the finding under Pennsylvania law "neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it." *Id.*, at 87-88, 106 S.Ct. at 2417-2418. Thus we concluded that the requirement that the findings be made by a judge rather than the jury did not violate the Sixth Amendment because "there is no Sixth Amendment right to jury sentencing, even where the sentencing turns on specific findings of fact." *Id.*, at 93, 106 S.Ct., at 2420. Like the visible possession of a firearm in *McMillan*, the existence of an aggravating factor here is not an element of the offense but instead is "a sentencing factor that comes into play only after the defendant has been found guilty." *Id.*, at 86, 106 S.Ct., at 2417. Accordingly, the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentencing of death be made by the jury.

___ U.S. at ___, 109 S. Ct. at 2056-57.

II.

Alleged Prosecutorial Vindictiveness.

In *Alabama v. Smith*, ___ U.S. ___, 109 S. Ct. 2201 (June 12, 1989), this Court held that no presumption of vindictiveness arises when the state court imposes a harsher

sentence after trial than the defendant received under a plea agreement that he succeeded in having set aside on appeal. That is pertinent to two issues in the petition: (1) alleged capriciousness in the trial judge's sentencing respondent to death after a jury trial because, under the breached plea agreement, the judge sentenced him to a term of years for second-degree murder and (2) the presumption of vindictiveness applied by the majority to the prosecution's seeking the death penalty – as respondent agreed it could – after respondent breached the plea agreement.

Because Smith had the right to appeal his conviction and to seek to vacate the plea bargain, but respondent here did not have the right to breach the plea agreement, petitioners believe the Ninth Circuit's application of the presumption of vindictiveness is indefensible.

CONCLUSION

These two new cases are persuasive reasons for this Court to grant certiorari on all the issues, and petitioners respectfully request the Court to do so.

Respectfully submitted,

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DATED September 19, 1989.